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FOR ARGUMENT

In the Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-334.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BOSTON ET AL.,
APPELLANTS,

v.

STATE TAX COMMISSION ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Brief for Appellees.

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Questions Presented for Review.

1. Does a state tax statute discriminate against federal savings and loan associations when it permits both the state and federal institutions subject to the tax to deduct from gross income the additions which both are required by law to make to their guaranty funds?

2. Are credit unions "similar" to federal savings and loan associations under the standards of 12 U.S.C. § 1464(h) (1970)?

3. Does 12 U.S.C. § 1464(h) forbid states from imposing on federal savings and loan associations a franchise tax measured by income?

4. Does the Commerce Clause prohibit a domiciliary state from taxing federal savings and loan associations solely on the ground that a portion of the associations' income derives from real estate loans secured by out-of-state property?

5. Has Massachusetts violated either the Due Process or Equal Protection Clause of the Fourteenth Amendment, by its method of taxing federal savings and loan associations?

Statement of the Case.

Prior Proceedings.

This appeal is brought under 28 U.S.C. § 1257(2) (1970) from a decision of the Supreme Judicial Court of Massachusetts upholding a state taxing statute, M.G.L. c. 63, §§ 11(a)(1) and (b)(1) (West Supp. 1977), against state and federal constitutional challenges to its validity.

The suit was initiated in the state Superior Court on April 16, 1975, by the thirty-four federally chartered savings and loan associations located in Massachusetts ("appellants" or "the associations"); it sought a declaratory judgment under M.G.L. c. 231A, § 1 (West Supp. 1977), against the state Commissioner of Corporations and Taxation and the members of the State Tax Commission[1] ("appellees").

[1]The Commissioner of Corporations and Taxation sits as one of the three members of the Commission, M.G.L. c. 14, § 2 (West Supp. 1977). He was thus sued in both capacities.

On December 24, 1975, after completion of pleadings and discovery, the parties filed a stipulation of facts (Appendix ["A."] 10-144), and moved separately for summary judgment. Upon joint request of the parties, the case was reported without decision to the state Appeals Court (A. 4). The Supreme Judicial Court subsequently granted direct appellate review (A. 5).

The Supreme Judicial Court issued its decision upholding the statute on May 3, 1977.

Statement of Facts.

The appellants are federal mutual savings and loan associations chartered under the provisions of 12 U.S.C. §§ 1461-1468 (1970 and Supp. V. 1975); they all have their home offices in Massachusetts, and the record discloses no branch offices outside Massachusetts. They are members of the Federal Home Loan Bank System, 12 U.S.C. §§ 1421-1449 (1970 and Supp. V. 1975), and are insured by the Federal Savings and Loan Insurance Corporation, 12 U.S.C. §§ 1724-1730c (1970 and Supp. V. 1975) (A. 11).

The challenged statutory provisions, M.G.L. c. 63, §§ 11(a)(1) and (b)(1), were enacted in substantially their present form in 1966. Mass. Stat. 1966, c. 14, § 11.[1] Sections 11(a)(1) and (b)(1) impose on state-chartered savings and cooperative banks[2] and federal savings and loan

[1]Section 11 was one part of a major tax revision bill which, as a principal feature, introduced the sales tax to Massachusetts. Mass. Stat. 1966, c. 14, §§ 1-4. The statute has been amended since 1966, but the amendments do not affect the substance of this case. *See* Mass. Stat. 1971, c. 535, §§ 26, 67; Mass. Stat. 1975, c. 684, § 44.

[2]Section 11 also applies to state savings and loan associations. There is apparently only one such association with a Massachusetts charter.

associations located in Massachusetts a tax totaling 1.254 per cent of "net operating income";[4] that term is defined in § 11 as gross income from all sources, less (1) "operating expenses," (2) "net losses" allocable to the taxable year, and (3) "minimum additions . . . to [the taxpayer's] guaranty fund or surplus required by law or the appropriate federal and state supervisory authorities."

As enacted, M.G.L. c. 63, § 11, also imposed a tax on the deposits of the state banks and federal associations. M.G.L. c. 63, §§ 11(a)(2) and (b)(2). These deposits tax provisions were challenged by the United States in a separate case brought in federal court and were found invalid. *United States* v. *State Tax Comm'n*, 481 F. 2d 963 (1st Cir. 1973), *aff'g and modifying* 348 F. Supp. 397 (D. Mass. 1972). The deposits tax, *inter alia*, permitted a deduction from taxable deposits for all unpaid balances on loans secured by mortgages of real estate located within fifty miles of the taxpayer's main office. Since federal associations are permitted by Congress to make loans secured by real estate within a one-hundred-mile radius of the main office, while state banks are limited to a fifty-mile lending radius, the fifty-mile deduction was held to discriminate against the federal associations in such a way as to discourage lending for home building purposes throughout the full area intended by Congress. 481 F. 2d at 970. As a result of the judgment entered in federal court, Massachusetts refunded to the federal savings and loan associations all taxes collected under §§ 11(a)(2) and (b)(2).[5]

Thus, when the present case arose, federal savings and loan associations were paying a tax assessed only on net operating income, while the state institutions were paying both an income and deposits-based tax. The associations nonetheless contended that the income-based tax in M.G.L. c. 63, §§ 11(a)(1) and (b)(1) ("§ 11"), discriminated against them, in violation of § 5(h) of the Home Owners' Loan Act of 1933, 12 U.S.C. § 1464(h) (1970) ("§ 1464(h)").

The associations' principal federal claim[6] related to the deduction for required minimum additions to guaranty funds under § 11. The federal savings and loan associations, since 1970, have been obliged by federal regulation to set aside a smaller percentage of assets for this purpose[7]

See M.G.L. c. 93, § 34 (West Supp. 1977). The parties did not raise any issues concerning state savings and loan associations in state court, and none are presented in this appeal.

[4] The income-based portion of the tax is levied in two steps. Section 11(a)(1) requires a tax of 0.627 per cent of estimated net operating income to be paid on the 25th day of the seventh month of the taxable year. Subsequently, on the 25th day of the month following the close of the taxable year, § 11(b)(1) requires payment of 1.254 per cent of actual net operating income, minus the estimated tax paid under § 11(a)(1).

[5] Six federal savings and loan associations intervened in the deposits tax challenge, and added, as their own independent cause of action, an attack on §§ 11(a)(1) and (b)(1) which was substantially the same as the one now before this Court. The district court, which had held the deposits tax invalid, upheld §§ 11(a)(1) and (b)(1). 348 F. Supp. at 400-401. The circuit court vacated the district court judgment on the procedural ground that the claim should first have been brought in the state courts. 481 F. 2d at 972-974.

[6] There were state statutory claims as well. *See* Jurisdictional Statement, 32-35, Mass. Adv. Sh. (1977) at 900-904, 363 N.E. 2d at 478-480.

[7] The associations' guaranty fund requirement arises as a condition to obtaining insurance from the Federal Savings and Loan Insurance Corporation. 12 U.S.C. § 1726(b). The amount of the requirement lies within the Corporation's judgment, exercised through regulations, "but such regulations shall require the building up of reserves to 5 per centum of all insured accounts within a reasonable period, not exceeding twenty years . . .." The Corporation may extend the twenty-year limitation by ten years if it deems the extension necessary to meet mortgage needs. The Corporation has not extended the period. It has set the rate of

than state law demands from state savings and cooperative banks.[5] Their deduction under § 11 was therefore also smaller, and this, they claim, represented discrimination forbidden by § 1464(h). Further, the appellants sought to invalidate § 11 because credit unions are not subject to the tax. They claimed that the credit unions are "similar" to federal savings and loan associations within the meaning of § 1464(h), and the exclusion of credit unions from § 11 was therefore discriminatory. The appellants also claimed that the type of tax imposed by § 11 was not among those authorized by Congress in § 1464(h).

Appellants offered three constitutional grounds for invalidating § 11, all similar in substance to one another. On account of the state's failure to exclude income derived from real estate loans secured by out-of-state property, the statute was alleged to violate the Commerce Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The Supreme Judicial Court found the state statute valid. It held that:

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additions to the fund at 1/4 of 1 per cent of account balances per year, or 1/20 of the total requirement. After twenty years, the further additions are a reflection of the increase in the total value of the association's accounts. 12 C.F.R. § 563.13(a)(1) (1977).

[5]The guaranty fund requirements for savings banks are found in M.G.L. c. 168, § 58 (West 1971). The total requirement is 7½ per cent of deposits, except that the trustees may elect to transfer money to surplus, rather than the guaranty fund, if the fund amounts to at least 5 per cent of deposits. The guaranty fund is held to meet losses in the business of the savings banks.

The guaranty fund requirements for cooperative banks, found at M.G.L. c. 170, § 38 (West 1971), are also used to meet business losses as well as for "changes in assets, or to establish reserves therefor." The requirement totals 10 per cent of total assets, rather than of deposits. The required additions are 5 per cent of net profits "at each distribution date."

1. The deduction for required additions to guaranty funds is not discriminatory under the terms of 12 U.S.C. § 1464(h), since "[t]he excise statute is wholly neutral." Moreover, the deduction did not frustrate the purposes of § 1464(h), because it was not shown to create a substantial competitive disadvantage for the associations. Jurisdictional Statement ("J.S.") 40, Mass. Adv. Sh. (1977) at 909, 363 N.E. 2d at 482.

2. Massachusetts credit unions are not "similar" to federal savings and loan associations in purpose, structure, or actual practice. J.S. 43, Mass. Adv. Sh. (1977) at 913, 363 N.E. 2d at 484.

3. "The excise imposed by G.L. c. 63, § 11, is a franchise tax," measured by income. As such, it falls within the categories of tax explicitly listed in § 1464(h), and cannot be deemed unauthorized by Congress. J.S. 36, Mass. Adv. Sh. (1977) at 904, 363 N.E. 2d at 480.

4. The associations' Commerce Clause attack failed because (a) they had not shown "the extent of the contacts of any association with any other State," and (b) their assertions about multiple taxation were speculative and unfounded. J.S. 38, 39, Mass. Adv. Sh. (1977) at 907, 908, 363 N.E. 2d at 481, 482.

5. The due process and equal protection claims were without merit. J.S. 40, Mass. Adv. Sh. (1977) at 910, 363 N.E. 2d at 482.

Summary of Argument.

Appellants' principal claims arise under 12 U.S.C. § 1464(h). This statute reflects a Congressional policy decision that states should be empowered to tax federal

savings and loan associations so long as the tax does not favor state banking institutions which are in competition with them. The judicial inquiry required by § 1464(h) has two major parts: (1) whether the state taxes the state and federal institutions in substantially equal measure and (2) whether, as required by § 1464(h), the tax includes all state institutions "similar" to federal savings and loan associations.

In argument I appellees show that the challenged excise provisions, M.G.L. c. 63, §§ 11(a)(1) and (b)(1), are neutral on their face and in their practical effect. The deduction in § 11 for each institution's minimum required additions to its guaranty fund is designed to recognize that such payments deserve to be offset against income. It does not unfairly distinguish between appellants and their state counterparts. Nor have appellants offered any proof that their guaranty fund requirements actually result in a pattern of disparate tax impact. In fact, the maximum impact of the guaranty fund deduction is quite small. At bottom, appellants are attempting to exempt themselves from state taxation under § 11 altogether, on the ground that the guaranty fund deduction does not achieve mathematical equality between federal and state institutions. Section 1464(h) does not demand such rigidity. The appellants must pay their fair share in supporting the costs of state government. (Pp. 10-21.)

The second argument shows that the exclusion of Massachusetts credit unions from the tax imposed by § 11 does not violate § 1464(h), since credit unions are not "similar local mutual or cooperative thrift and home financing institutions." The purposes of federal associations and credit unions are different. The federal associations were created to provide home financing. Credit unions, in

contrast, enable persons of moderate means to pool their limited savings and obtain personal loans at low interest.

Massachusetts' tax policy on credit unions mirrors that of Congress; it exempts federal and state credit unions from corporate taxation at the same time it taxes federal savings and loan associations and state cooperative and savings banks. Section 1464(h) should not be read to prohibit states from adopting the same framework for taxation that Congress itself espouses. Moreover, the legislative history of § 1464(h) confirms that Congress did not consider credit unions to be "similar." If federal savings and loan associations believe that credit unions ought to be taxed in the same manner as they, their argument is properly directed to Congress, not this Court. (Pp. 22-29.)

Finally, an analysis of the record shows that credit unions actually operate differently and at a far more modest level than appellants. Their activities are thus not similar. (Pp. 30-36.)

Argument III shows that the tax imposed by § 11, a franchise tax measured by income, is authorized by Congress. Section 1464(h) includes "franchise" taxes in its terms, and the use of net income to measure the value of the franchise is well-accepted by the Court. Moreover, contrary to appellants' argument, the determination of which deductions ought to be included in determining "net income" is not a question for the Court but a classic policy issue for the state Legislature. (Pp. 37-39.)

The fourth argument addresses appellants' Commerce Clause claim. Appellants are domiciled in Massachusetts, and all their income-producing activity is centered in Massachusetts. Under these facts, the Commonwealth's tax on the associations' franchise does not raise a serious Commerce Clause question, even assuming appellants' activities have substantial interstate connections. What is

more, appellants have failed to establish the interstate nature of their business. Their claims of multiple taxation are therefore speculative, and their Commerce Clause claim without merit. (Pp. 40-45.)

The fifth and final argument treats appellants' due process and equal protection claims. The arguments advanced for both were long ago disposed by this Court as insubstantial. (Pp. 45-47.)

Argument.

I. The Statute's Deduction from Gross Income for Required Additions to an Institution's Guaranty Fund does Not Violate 12 U.S.C. § 1464(h), Because it is a Fair, Neutral, and Nondiscriminatory Measure which Imposes No Competitive Disadvantage on the Federal Associations.

The tax imposed on appellants by § 11 is sound in policy and evenhanded in operation. The associations' challenge focuses on the statutory deduction from gross income for "minimum additions during the taxable years to [the taxpayer's] guaranty fund or surplus required by law or the appropriate federal and state supervisory authorities." State and federal institutions are all obliged to set aside a specified portion of their funds for this purpose as a contingency to meet business losses.[9] Each institution is disadvantaged in its profit-making activities to the degree that it

[9] The guaranty funds of federal savings and loan associations, savings banks and cooperative banks are described above. See pp. 5-6, nn. 7, 8, *supra*.

must take these funds out of circulation. Hence, the Massachusetts Legislature's decision to eliminate additions to the guaranty fund from taxable "net operating income" under § 11 is plainly rational.[10]

The appellants' claim of discrimination under the standards of § 1464(h) is without merit. The statute on its face treats all taxed institutions identically, and the differing guaranty fund requirements do not unfairly differentiate the associations from their state counterparts. Indeed, the associations offer no evidence that their actual tax burden is any greater than the state institutions', as measured by income, deposits, assets, or any other standard. This failure of proof is fatal; it disregards the Court's admonition that when a taxpayer seeks to show discrimination on account of a "greater" tax, the amount of the tax itself is the starting point. *E.g.*, *Michigan Nat'l Bank* v. *Michigan*, 365 U.S. 467, 478-479 (1961); *Tradesmens Nat'l Bank* v. *Oklahoma Tax Comm'n*, 309 U.S. 560, 567 (1940).

In the place of proof appellants seek to erect a rigid standard of undeviating equality as the measure of the tax's validity. They assert that because the federally-set rate of guaranty fund additions for the associations is currently, and fortuitously, lower than the rate set for state institutions, the associations should be exempt altogether from taxation. The true measure, however, is not mathematical equality. *First Nat'l Bank of Wellington* v. *Chapman*, 173 U.S. 205, 216 (1899).[11] The associations, like other busi-

[10] Such a law presents a poor target for judicial intrusion. *Cf. Ferguson* v. *Skrupa*, 372 U.S. 726, 730 (1963) ("courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws").

[11] It is a truism, as *Chapman* declared, that "mathematical equality . . . cannot be reached in any system of taxation, and it is useless and

nesses domiciled in Massachusetts, must pay their fair share for the maintenance of their state government.[12]

At bottom, the validity of § 11 turns on the meaning of § 5(h) of the Home Owners' Loan Act, § 1464(h). It reads as follows:

> No State . . . taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income *greater than* that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions. (Emphasis added.)

The Supreme Court has addressed the meaning of § 1464(h) twice. On both occasions the Court construed the "greater than" language to refer to "discrimination" in the state's treatment of federal and state institutions. *Michigan Nat'l Bank* v. *Michigan, supra,* 365 U.S. at 481; *Laurens Fed. Sav. & Loan Ass'n* v. *South Carolina Tax Comm'n,* 365 U.S. 517, 523 (1961). The Court has further stated that the meaning of discrimination in this context is to be derived from 12 U.S.C. § 548, the law governing state taxation of national banks, which in the Court's words

idle to attempt it. Equality, so far as the differing facts will permit, and as near as they will permit, is all that can be aimed at or reached." 173 U.S. at 216.

[12] The associations seek to recover all taxes collected by Massachusetts since 1966, the date the taxing statute was enacted. *See, e.g.,* Complaint, ¶¶ 83, 88, and Prayer 1(a) (S.J.C. App. 47, 48, 54). The associations have already received refunds of all moneys collected under the deposits-based portion of the tax (M.G.L. c. 63, § 11(a)(2), (b)(2)) pursuant to the mandate in *United States* v. *State Tax Comm'n,* 481 F. 2d 963 (1st Cir. 1973).

should be read "in pari materia" with § 1464(h).[13] *Michigan Nat'l Bank* v. *Michigan, supra,* 365 U.S. at 481.

Thus, appellants' speculations in favor of a constricted reading of the words "greater than" must face compari-

[13] The reasons for the "in pari materia" relationship are not hard to find. Section 1464(h) was enacted as one part of the Home Owners' Loan Act of 1933, c. 64, §§ 1-9, 48 Stat. 128, a detailed scheme which created the federal savings and loan associations. Like national banks, the associations are chartered, regulated and insured by the federal government. In creating the associations Congress was absorbed with the primary issue of channeling loans to homeowners. In neither the Congressional reports, *see* H.R. Rep. No. 55, 73d Cong., 1st Sess. (1933); H.R. Rep. No. 210, 73d Cong., 1st Sess. (1933), nor the floor debate, *see* 77 Cong. Rec. 2429, 2474-2507, 2567-2588, 4930, 4974, 4995, did Congress focus on the meaning of § 1464(h).

In the area of national banks, however, Congress has deliberated and legislated over a long period on the question of state taxing power. The result has been a policy designed to "prevent actual discrimination" against national banks while "allow[ing] the states considerable freedom in working out an equitable tax system . . .." *Tradesmens Nat'l Bank* v. *Oklahoma Tax Comm'n,* 309 U.S. 560, 567 (1940); *see, e.g., Davenport Bank* v. *Davenport Board of Equalization,* 123 U.S. 83, 85 (1887).

When the Home Owners' Loan Act of 1933 was enacted, § 548 read as set forth in the statutory appendix to this brief (Revised Statutes § 5219, *infra,* pp. 49-51). In 1969, Congress enacted the current version of § 548. Pub. L. 91-156, § 2(a), 83 Stat. 434. It states:

> For the purposes of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located.

Legislative history to this new § 548 stated: "The committee is in full accord with the principle that every State government should be allowed the greatest possible degree of autonomy with regard to the formulation of its tax structure." S. Rep. No. 91-530, 91st Cong., 1st Sess., *reprinted in* [1969] U.S. Code Cong. & Ad. News 1594, 1595.

son with the Court's decisions construing § 548.[14] Those decisions reflect a respect for federalism, limited by principles of fair dealing. Thus, the Court from an early date has held:

> The main purpose of Congress . . . in fixing limits to state taxation . . . was to render it impossible for the State, in levying such a tax, to create and fix *an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business* and operations and investments of a like character. The language of the act of Congress is to be read in light of this policy. *Mercantile Bank* v. *New York*, 121 U.S. 138, 155 (1887) (emphasis added).

[14] It is arguable that states possess inherently greater taxing power over federal savings and loan associations than over national banks. Congress enacted § 548 because the Supreme Court had held national banks to be federal instrumentalities, exempt from state taxation unless and only to the extent permitted by Congress. *Owensboro Nat'l Bank* v. *Owensboro*, 173 U.S. 664, 667-668 (1899). *See McCulloch* v. *Maryland*, 4 Wheat. 316 (1819). However, this Court has never held a federal savings and loan association to be a federal instrumentality. If the question were presented to a *tabula rasa*, it is not self-evident that the Court would so classify them, since even the continuing validity of the designation of national banks, as "federal instrumentalities" is in doubt. *See First Agricultural Nat'l Bank* v. *State Tax Comm'n*, 392 U.S. 339, 348-363 (1968) (Marshall, Harlan and Stewart, JJ., dissenting) *United States* v. *County of Fresno*, 429 U.S. 452, 457-463 (1977); Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication*, 75 Mich. L. Rev. 1426, 1446-1452 (1977). *See also* S. Rep. No. 91-530, *reprinted in* [1969] U.S. Code Cong. & Ad. News 1594, 1595. (Senate Committee on Banking and Currency agrees that "there is no longer any justification" for tax immunity based on the "federal instrumentality" label).

The fact that acts of Congress have addressed the area does not entirely moot the question. For if federal savings and loan associations are not federal instrumentalities, state taxation in some degree would be possible without the permission of Congress. In such circumstances § 1464(h) should be read more generously than § 548, since § 548 permits taxes on national banks which would be foreclosed altogether without Congressional action. *Cf. Railroad Co.* v. *Commissioners*, 103 U.S. 1, 3 (1880) (presumption is against immunity from state taxation); *United States* v. *City of Detroit*, 355 U.S. 466, 474 (1958) (use of tax immunity to achieve economic preference over competitors disfavored by Court).

See Bank of Redemption v. *City of Boston*, 125 U.S. 60, 67 (1888) (exact equality in result not required); *First Nat'l Bank of Wellington* v. *Chapman*, *supra*, 173 U.S. at 213-214 (quoting *Mercantile Bank* and upholding state law).

More recently, the Court has sounded the same theme:

> [A] State's tax system offends only if in *practical operation* it discriminates against national banks or their shareholders as a class. *Michigan Nat'l Bank* v. *Michigan*, *supra*, 365 U.S. at 476 (emphasis added).[15]

What § 548 and, by derivation, § 1464(h) prohibit are state laws which use the taxing power to create an unfair advantage for state institutions competing with national banks or federal associations through tax systems which have a substantially disproportionate impact on the federal institutions. *See, e.g., People* v. *Weaver*, 100 U.S. 539

[15] The only case other than *Michigan Nat'l Bank* to mention § 1464(h) was *Laurens Fed. Sav. & Loan Ass'n* v. *South Carolina Tax Comm'n*, *supra*. The Court there stated that the purpose of § 1464(h) was to bar "discriminatory state taxation." 365 U.S. at 523. At issue in *Laurens* was the propriety of a state tax on loan advances by the Federal Home Loan Bank Board, in light of the categorical tax exemption for the Board in 12 U.S.C. § 1433. The Court thus had no reason to, and did not, analyze the meaning of discrimination under § 1464(h).

(1879) (state withholds from national bank shareholders a deduction given to moneyed capital otherwise invested).

The state tax imposed by § 11 contains no such unfairness, either on its face or in its practical application. The rate of the tax is the same for all taxed institutions, state and federal. The same deductions apply to all institutions as well. And the guaranty fund deduction does not directly affront a Congressional policy, as was the case in *United States* v. *State Tax Comm'n*, 481 F. 2d 963 (1st Cir. 1973), where the deposits tax deduction directly penalized federal associations for having a 100-mile real estate mortgage lending radius.[16] See p. 4, *supra*.

These elements establish the neutrality of § 11. What remains is the question whether, in its operation, the statute produces a tax burden so disparate in impact that, neutrality notwithstanding, the tax must fall. The associations have not presented substantial evidence on this issue. First, they have failed to offer facts deemed vital by this Court in assessing claims of tax discrimination. Second, the evidence they do offer on the guaranty fund deductions shows no pattern of discriminatory impact. Finally, no inference can be drawn of an "unfriendly motive" by the Legislature in creating the deduction for required additions to the guaranty fund. *Cf. United States* v. *State Tax Comm'n*, *supra*, 481 F. 2d at 970.

(1) *Lack of Proof of Tax Impact.*

The associations' own argument is that impact is the key (Appellants' ["App."] Br. 21, 29), but nowhere on the

[16] The 50-mile limit for deductions from the deposits tax could only be explained as favoring the lending limits imposed on Massachusetts banks. If that deduction was to be justified, therefore, it had to be on the basis that such favoritism was permissible. Here, by contrast, there is plainly a neutral explanation for the deduction. See pp. 10-11, *supra*.

record do they present evidence of overall comparative tax burdens or the comparative tax impact of the challenged deduction by itself.[17] As a result, the record is bare on the question of the state statute's "practical operation," *Michigan Nat'l Bank* v. *Michigan*, *supra*, 365 U.S. at 476.

The Court has emphasized that it is:

> . . . incumbent upon plaintiff in error to show affirmatively that the [state] taxation system discriminates in fact against [him], before calling upon the courts to overthrow it . . .. *Amoskeag Savings Bank* v. *Purdy*, 231 U.S. 373, 393 (1913).[18]

The associations bear the burden of providing the Court with a record which "affirmatively" demonstrates that the

[17] The reason for the associations' failure to present such evidence is apparent. The public record reveals that since 1966 the associations have consistently paid less or the same taxes in proportion to total assets than either state savings or cooperative banks. *See* [1968] Mass. Comptroller's Rep., Mass. Pub. Doc. 140 (1969), *abstracted in* Mass. H.R. No. 800 (1969); [1970] Mass. Comptroller's Rep., Mass. Pub. Doc. 140 (1971), *abstracted in* Mass. H.R. No. 800 (1971); [1976] Mass. Comptroller's Rep., Mass. Pub. Doc. 140 (1977), *abstracted in* Mass. H.R. No. 800 (1977).

[18] The Court, in *Michigan Nat'l Bank*, *supra*, elaborated on *Amoskeag* as follows:

> "[I]t is not a valid objection to a tax on national bank shares that other moneyed capital in the state [is] . . . taxed at a different rate or assessed by a different method unless it appears that the difference in treatment results *in fact* in a discrimination unfavorable to the holders of the shares of national banks." 365 U.S. at 478-479, quoting *Tradesmens Nat'l Bank* v. *Oklahoma Tax Comm'n*, *supra*, 309 U.S. at 567 (emphasis added).

tax in question "discriminates in fact." *Tradesmens Nat'l Bank* v. *Oklahoma Tax Comm'n*, *supra*, 309 U.S. at 567-568 (Court provided with stipulated facts regarding actual tax burdens); *see, e.g., First Nat'l Bank of Hartford* v. *City of Hartford*, 273 U.S. 548, 559 (1927) (ample uncontradicted evidence demonstrated discrimination). This burden is particularly important when a tax statute is neutral on its face. *First Nat'l Bank of Wellington* v. *Chapman*, *supra*, 173 U.S. at 218-219.

(2) *Ambiguity of Evidence Presented.*

The evidence which appellants did choose to bring forward contradicts their claim of discrimination. Principally, they present for each federal and state institution covered by § 11 a record of deductions for required additions to guaranty funds over a number of years (A. 15-129). Rather than tying these figures to tax payments, the associations proffer only ratios of guaranty fund deductions to assets for the three types of affected institutions. These ratios prove nothing, however, about the tax impact of the deductions, since income, not assets, is the measure of the tax. The ratios are therefore immaterial to the Court's inquiry.

Moreover, these ratios show that in the most recent year, 1974, the associations received in the aggregate a larger deduction for additions to the guaranty fund than either the savings banks or cooperative banks (A. 130-132). Overall, the ratios are in such close compass for all institutions as to belie any injury on account of the deduction under § 11, much less discrimination[14] (A. 130-132).

[14] Additions to guaranty funds for the three types of institutions are not calculated on the same base. See pp. 5-6, nn. 7, 8, *supra*. Accordingly, the ratios do not provide an accurate basis of comparison between the associations and savings and cooperative banks.

Unless precise mathematical equality is the standard under § 1464(h), appellants cannot prevail. This Court has never permitted such a "mathematical nicety"[15] to become the measure of discrimination in the banking[16] or indeed in any other sphere of discrimination analysis.[17] It should not do so in this case.[18]

[15] *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970).

[16] *E.g.*, in *First Nat'l Bank* v. *Anderson*, 269 U.S. 341, 348 (1926), the Court stated:

> The [§ 548] restriction is not intended to exact mathematical equality . . . nor to do more than require such practical equality as is reasonably attainable in view of the differing situations . . ..

[17] *E.g.*, *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911) (equal protection); *cf. Washington* v. *Davis*, 426 U.S. 229, 239-240 (1976) (same); *South Carolina State Highway Dept.* v. *Barnwell Brothers, Inc.*, 303 U.S. 177, 190-191 (1938) (Commerce Clause).

[18] Although the record does not disclose the tax impact of the challenged deductions, it does suggest that the impact is, at most, very small. Using 1974 for comparison, it appears that the 144 state cooperative banks compiled a total deduction of $13,069,201 for minimum required additions to their guaranty funds, or an average deduction of $90,758 (A. 52-56, 131). The 167 savings banks shared a total deduction of $37,850,736.73, averaging $226,651 per bank (A. 105-111, 131). By comparison, the 34 federal savings and loan associations shared a deduction of $7,508,841, or an average $220,848 per association (A. 132). These are not figures which lend support to a claim of discrimination.

A review of the list of deductions for individual institutions further negates a discriminatory pattern. For example, during the period 1968-1974 some federal savings and loan associations had no deductions for additions to the guaranty fund, *e.g.*, Bay State Federal Savings & Loan Association (A. 113), while others had substantial deductions each year, *e.g.*, First Federal Savings & Loan Association of Lowell, Leader Federal Savings & Loan Association (A. 118). Some had no deductions in early years, *e.g.*, Mutual Federal Savings & Loan Association of

(3) *Unfriendly Motive.*

In 1966, at the time § 11 was enacted, the federal savings and loan associations were required under the terms of their charter to maintain reserves equal to 10 per cent of their capital.[14] This requirement was equal to the state requirement for cooperative banks and greater than the guaranty fund requirement for savings banks.[15] It was not until 1970, as noted in the Solicitor General's brief,[16] that the associations' reserve requirements were lowered to their current level. 12 C.F.R. § 544.1, 35 Fed. Reg. 4044 (March 4, 1970; effective April 10, 1970).[17] Thus, contrary to the appellants' assertions, it is plain that the Massachusetts Legislature had no intent to discriminate against the federal associations in enacting the guaranty fund deduction. *Cf. United States* v. *State Tax Comm'n, supra,* 481 F. 2d at 970.

Whitman (A. 123), while others lacked deductions only in recent years, *e.g.*, Milford Federal Savings & Loan Association (A. 122). Fluctuations also appear in the guaranty fund deductions for savings and cooperative banks, *e.g.*, 21 savings banks had no deductions in 1968 (A. 63-67). Grafton Cooperative Bank and New Bedford Acushnet Cooperative Bank had no deductions during 1972-1975 (A. 41-61).

[14] *See* Stipulation of Facts, ¶ 2 (A. 11), Charter N, ¶ 10 (S.J.C. App. 145), and Charter K (rev.), ¶ 10 (S.J.C. App. 148).

[15] *See* p. 6, n. 8, *supra*. Notably, the savings banks' assets are far larger than either the federal associations' or cooperative banks' (A. 130-132). Acceptance of the appellants' argument would compel the conclusion that the Legislature discriminated against the dominant state institution.

[16] Brief for the United States, p. 18, nn. 5, 6.

[17] See p. 5, n. 7, *supra*, and S.J.C. App. 149-150. The lower reserve requirements were optional, requiring a charter amendment to take advantage of them. The record discloses that four of the appellants have not amended their charters (S.J.C. App. 152, n. 1), and, accordingly fail to state a claim for relief.

Finally, the appellants' characterization of their smaller current guaranty fund additions as a burden is a self-serving assertion contrary to reason. The smaller requirements permit them to use more of their money for lending purposes or for distribution to members.[18] It is the institutions with higher guaranty fund requirements which bear a comparative burden, by having to take more money out of circulation. The Massachusetts Legislature's decision to permit the guaranty fund deduction is plainly a reflection of this fact. It is not surprising, therefore, that the associations have offered no credible inference of an unfriendly legislative motive underlying the guaranty fund deduction.[19] *See Michigan Nat'l Bank* v. *Michigan, supra,* 365 U.S. at 473; *cf. United States* v. *State Tax Comm'n, supra,* 481 F. 2d at 970.

The tax on appellants is rational and fair. The statute should be upheld.

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[18] The associations criticize the state court's suggestion that the money not required for guaranty fund additions could be distributed to members (App. Br. 22). *See* J.S. 40, Mass. Adv. Sh. (1977) at 909, 363 N.E. 2d at 482. They point to the limits on distribution of profits, apparently chiding the court for not realizing that the associations are enjoying profits in excess of distribution capacity. Such funds may, of course, be held for distribution in less affluent years.

[19] As the Supreme Judicial Court pointed out, "[t]he cause of the discrimination is the lower requirements imposed by the Federal regulatory agency on Federal savings and loan associations. The Commonwealth is not the source of the discrimination." J.S. 40, Mass. Adv. Sh. (1977) at 909, 363 N.E. 2d at 482.

II. The Exemption of Massachusetts Credit Unions from the Challenged Tax is Consistent with the Provisions of 12 U.S.C. § 1464(h), and does Not Serve to Invalidate the Tax.

A. *Introduction.*

The associations' second line of attack under § 1464(h) focuses on Massachusetts credit unions. Both state and federally chartered credit unions are exempt from the § 11 excise. The associations complain that the exemption as to the state credit unions[30] violates § 1464(h) because these entities constitute "other similar local mutual or cooperative thrift and home financing institutions" within the meaning of that section.

The claim demands rejection. Massachusetts credit unions are in character, purpose and operation different from the state-chartered banks and federal savings and loan associations subject to the § 11 tax. Since the creation of the state's first credit union in 1892,[31] credit unions have always been cooperative membership organizations composed of persons with moderate means who have pooled their individual, limited savings or deposits together; the purpose of the unions is to enable the members to obtain

[30] The associations limit their claim to state-chartered credit unions. Congress has exempted federally-chartered unions from all federal and state taxes except nondiscriminatory real and tangible personal property, social security, Medicare and unemployment insurance taxes. 12 U.S.C. § 1768 (1970); I.R.C. §§ 501(c)(14)(A), 3112, 3305.

[31] The Globe Savings and Loan Association, a credit union with a membership limited to employees of the *Boston Globe*, was established in that year. *See* J.L. Snider, *Credit Unions in Massachusetts* at 6 (1939). Massachusetts was the first state to enact a credit union statute, Mass. Stat. 1909, c. 419, which authorized the formation and incorporation of credit unions upon approval of the Commissioner of Banks.

personal loans at reasonable interest rates.[32] Unlike the institutions taxed by § 11, a credit union is an organization limited in membership to persons tied together by a common bond of employment, association or residence; and the members themselves control the operation of each union. Predictably, given these characteristics, there are a far greater number of credit unions than savings banks, cooperative banks or savings and loan associations in Massachusetts.[33] Predictably as well, the assets of credit unions are far smaller than those of the other financial institutions.[34]

Massachusetts' policy decision to exempt its credit unions from the franchise tax[35] represents a reasonable and valid taxing judgment which Congress and a large majority of states have also made. The legislative history of § 1464(h) provides a further specific indication that Congress did not intend to bring credit unions within the purview of the "other similar . . . institutions" language of § 1464(h). In light of these factors, the Court should not construe that

[32] *See* J.L. Snider, *supra*, at 3, 20. Put in statutory terms, credit unions are corporations organized "for the purpose of accumulating and investing the savings of its members and making loans to them for provident purposes . . .." M.G.L. c. 171, § 2 (West 1971).

[33] In 1973, there were 370 credit unions (A. 145; Annual Report of the Massachusetts Commissioner of Banks for 1973, Section B, at 84), 167 savings banks (A. 98-104), 144 cooperative banks (A. 46-51), and 34 federal savings and loan associations (A. 113-129).

[34] In 1973, Massachusetts credit unions' assets totalled $1,011,568,892 (Annual Report of the Massachusetts Commissioner of Banks for 1973, Section B, at 84); the total for savings banks was $18,456,156,660 (A. 131); the total for cooperative banks was $2,971,845,658 (A. 131); and the total for federal savings and loan associations was $2,477,195,150 (A. 132).

[35] Massachusetts credit unions are subject to real property taxes, sales and use taxes, and transfer taxes. See p. 25, n. 37, *infra*.

statutory language to include credit unions, and should affirm the validity of the Massachusetts tax statute.

B. *Congressional Taxing Policy Governing Credit Unions and the Legislative History of* § 1464(h) *Both Indicate that Credit Unions are Not "Similar" Institutions within the Scope of* § 1464(h).

When § 1464(h) is considered in the context of other pertinent tax statutes and policies of Congress and its legislative history, *see, e.g., Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974); *see also Muniz* v. *Hoffman*, 422 U.S. 454, 458, 468 (1975), it becomes clear that the section should not be read to include credit unions.

1. Congressional Taxing Policy.

Congress exempts both state and federal credit unions from federal income tax. I.R.C. § 501(c)(14)(A). It has not granted the same income tax exemption to federal savings and loan associations, savings banks, or cooperative banks. Rather, since 1951 Congress has imposed a corporate income tax on these institutions. *See* I.R.C. § 11 and subchapter H.[36]

[36] When Congress first created federal savings and loan associations in 1933, it exempted them from all federal taxes, including taxes on their franchises, capital, reserves, surplus, loans, and income. Home Owners' Loan Act of 1933, c. 64, § 5(h), 48 Stat. 133. In 1951 § 1464(h) was amended to permit, *inter alia*, federal taxes on the associations' income. Act of October 20, 1951, c. 521, Title III, § 313(d), 65 Stat. 490. In 1962, Congress amended § 1464(h) to its present form, striking out all the previously stated prohibitions on federal taxes. Act of October 16, 1962, Pub. L. 87-834, § 6(e)(1), 76 Stat. 984.

These statutes demonstrate that Congress itself has made a tax policy determination in substance identical to that espoused by the Massachusetts Legislature in § 11: savings and loan associations, savings banks and cooperative banks should be taxed on income; credit unions should not.[37] In these circumstances, § 1464(h) should not be read as meaning that a state which taxes federal savings and loan associations — an activity explicitly permitted by § 1464(h) — must apply the same tax to state-chartered credit unions. Such an interpretation would require states either (a) to impose a tax on a class of organizations which Congress has consistently deemed worthy of tax protection, or (b) to forgo collecting a tax on a class of institutions which Congress has determined may properly be taxed. A reading of § 1464(h) which requires this result must be avoided. *See, e.g., Perry* v. *Commerce Loan Co.*, 383 U.S. 392, 399-400 (1966); *United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940). *Cf. Laurens Fed. Sav. & Loan Ass'n* v. *South Carolina Tax Comm'n*, 365 U.S. 517, 524 (1961).

[37] Congress' and Massachusetts' credit union tax policy is mirrored by other states; all but a small number, fewer than ten, exempt state-chartered credit unions from income or franchise taxes. *See* [1976] Credit Union Guide (Prentice-Hall) ¶ 60,003 at p. 60,005. At the same time, most states, including Massachusetts, impose property taxes and sales and use taxes on credit unions. *See* M.G.L. c. 59 (West 1973 and Supp. 1977) (real property tax); c. 64H, § 2 (West Supp. 1977) (sales tax); c. 64I, § 2 (West Supp. 1977) (use tax); *see also* [1976] Credit Union Guide (Prentice-Hall) ¶ 60,003 at pp. 60,006, 60,007. In addition, Massachusetts, like the majority of states, imposes a stamp or transfer tax on credit unions. *See* M.G.L. c. 64D, § 1 (West 1969); *see also* [1976] Credit Union Guide (Prentice-Hall) ¶ 60,003 at p. 60,005.

2. The Legislative History of § 1464(h).

Legislative history surrounding the enactment of the Home Owners' Loan Act of 1933, 48 Stat. 128, 12 U.S.C. §§ 1461-1468, offers further guidance to the meaning of "similar . . . institutions" in § 1464(h). The history reveals that Congress did not consider credit unions as "similar," thus supporting their exclusion from the § 11 tax.[38]

The Home Owners' Loan Act was designed to provide individuals with access to credit at low cost to finance or refinance their homes. *See* § 5(a) of the Act, 12 U.S.C. § 1464(a); 77 Cong. Rec. 2476-2477, 2479; *Laurens Fed. Sav. & Loan Ass'n* v. *South Carolina Tax Comm'n*, 365 U.S. 517, 523 (1961). The savings and loan associations which the Act provided for were created to offer direct, local sources of home financing credit, particularly in communities with inadequate institutional lending facilities.

Several sections of the Home Owners' Loan Act contained language very similar to the phrase "other similar local mutual or cooperative thrift and home financing institutions" appearing in § 1464(h).[39] Congressional debate

[38] Although the legislative history did not focus on § 1464(h) specifically, see p. 13, n. 13, *supra*, it did address the question of similar local institutions in its discussion of other sections. When available, such insights into the intent of Congress must be explored. *See Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 157 (1972); *Harrison* v. *Northern Trust Co.*, 317 U.S. 476, 479 (1963); *see National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 619-20 (1967); *Laurens Fed. Sav. & Loan Ass'n* v. *South Carolina Tax Comm'n*, *supra*, 365 U.S. at 521, 523-524. *See* H.R. Rep. No. 55, 73d Cong., 1st Sess. (1933), p. 2; S. Rep. No. 91, 73d Cong., 1st Sess. (1933), p. 2.

[39] *See* § 5(a) of the Act, 12 U.S.C. § 1464(a) (Federal Home Loan Bank Board to provide for creation of federal savings and loan associations, giving "primary consideration to the best practices of *local mutual thrift and home-financing institutions* in the United States" [emphasis supplied]); § 5(e) of the Act, 12 U.S.C. § 1464(e) ("[n]o charter [for a federal savings and loan association] shall be granted . . . unless the same can be established without undue injury to properly conducted existing *local thrift and home financing institutions*" [emphasis supplied]); § 6 of the Act, 12 U.S.C. § 1465 (appropriating sums for "the promotion and development of *local thrift and home-financing institutions*, whether State or Federally chartered").

concerning these sections — §§ 1464(e) and 1465 in particular — provides a clear indication of the specific types of local institutions with which Congress was concerned. Credit unions were not included.[40] *See* 77 Cong. Rec. 2480, 2579 (remarks of Representatives Luce and Celler);[41]

[40] The legislative history of §§ 1464(e), 1465 and other sections of the Home Owners' Loan Act is clearly pertinent to a consideration of § 1464(h). As a general rule, words used in one part of a statute are to be given a consistent meaning when they appear in other parts of the same statute. *See e.g.*, *United States* v. *Cooper Corp.*, 312 U.S. 600, 606-607 (1941); *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932); *see also Erlenbaugh* v. *United States*, 409 U.S. 239, 243-244 (1972). There is no indication that Congress intended "other local mutual or cooperative thrift and home financing institutions" in § 1464(h) to have any different meaning than the similar language it used in §§ 1464(a), 1464(e) and 1465. *See Union Nat'l Bank of Clarksburg* v. *Home Loan Bank Board*, 233 F. 2d 695, 696 (D.C. Cir. 1956). In particular, the use of the terms "mutual" and "cooperative" in § 1464(h) but not in the other sections seems without significance; Congressional discussion of the other provisions shows that the entities considered as "local thrift and home financing institutions" were in fact "mutual" or "cooperative" organizations.

[41] The Congressmen here were debating the provisions of §§ 1465 and 1464(e). Representative Luce of Massachusetts, a sponsor of the Act, indicated at 2480 that the purpose of encouraging the development of federal savings and loan associations — the specific aim of § 1465 — was to serve the many communities in the country that had no "building and loan associations, mutual savings banks, and no insurance company . . .." He defined "thrift institutions" in similar terms. (He also explained that building and loan associations were essentially identical to cooperative banks, *id.*) As a sponsor, Representative Luce's views on the Act's meaning are entitled to great weight. *See National Woodwork Mfrs. Ass'n* v. *NLRB*, *supra*, 386 U.S. at 640.

4987 (remarks of Representative Hebert);[42] *see also* 77 Cong. Rec. 2479 (remarks of Representative Luce); 2481 (remarks of Representatives Celler and Luce); 2483-2486 (Federal Home Loan Bank Board study of financing institutions' mortgage activities; credit unions not included).

The failure to mention credit unions in connection with these sections of the Home Owners' Loan Act cannot be explained away as happenstance. The Congress which passed that Act was well aware of credit unions. In its next sitting it enacted legislation to establish a federal credit union system. Federal Credit Union Act of 1934, 48 Stat. 1216, 12 U.S.C. §§ 1751-1790. This legislation was introduced by the respective branches' Committees on Banking and Currency, which had also been responsible for the Home Owners' Loan Act. *See* 77 Cong. Rec. 3206 (Senate, 1933); 7259-7261 (Senate, 1934); 12218-12226 (House, 1934). Indeed, in the House of Representatives the same individuals who had managed the Home Owners' Loan Act were also the sponsors of the Federal Credit Union Act. *See* 77 Cong. Rec. 12218, 12223, 12224-12225. In Congressional debate about the Credit Union Act, no link was drawn or suggested between credit unions and savings and loan associations, although the Act itself permitted credit unions to take mortgages.[43] 77 Cong. Rec. 3206, 7259, 12223-12225. Moreover, the Federal Credit Union Act established a regulatory system which lodged supervisory

[42] Representative Hebert debated the language in § 1464(e) providing that no charter for a new federal savings and loan association should be granted if it would unduly injure "properly conducted existing local thrift and home-financing institutions." His discussion makes clear that he understood "local thrift and home-financing institutions" to refer to building and loan associations and related home financing organizations; this interpretation appears accepted by all.

[43] *See* § 7 of the Act, now 12 U.S.C. § 1757.

control in the Farm Credit Administration rather than in the Federal Home Loan Bank Board. The credit unions thus operated independently of the federal savings and loan associations and the entire Federal Home Loan Bank system of which the associations were and are a part. *Compare* 12 U.S.C. §§ 1421, 1423, 1424, 1464(f), *with* Federal Credit Union Act of 1934, §§ 2, 16, 12 U.S.C. §§ 1752a, 1753-1756, 1766.

The legislative record thus shows a Congressional understanding of credit unions as a class of organizations separate from the lending institutions mentioned in connection with § 1464(h). Neither the Federal Credit Union Act nor § 1464(h) has been amended in a way that would suggest a change in this view. In such circumstances, § 1464(h) should be construed to reflect the limitations intended by its framers. *See, e.g., Monroe* v. *Pape*, 365 U.S. 167, 191 (1961); *see also Moody* v. *Albemarle Paper Co.*, 417 U.S. 622, 626 (1974); *cf. United States* v. *Bacto-Unidisk*, 394 U.S. 784, 799-800 (1969). The reasons advanced by appellants and the United States in this case for extending § 1464(h) are essentially policy arguments, appropriately addressed to Congress and not this Court. *See First Agricultural Nat'l Bank* v. *State Tax Comm'n*, 392 U.S. 339, 345-46 (1968).[44]

[44] *First Agricultural Nat'l Bank*, also involving a Massachusetts tax on federally-chartered financial institutions, pointed out the special importance of judicial deference in this field because it is an area of particular Congressional concern. Recent legislative action relating to credit unions and savings and loan associations underscores the wisdom of this observation. The lending, borrowing and investment powers and tax treatment of these entities, among others, has recently been the subject of a comprehensive study. *See* Senate Committee on Banking, Housing and Urban Affairs, 93d Cong., 1st Sess., *Report of the President's Commission on Financial Structure and Regulation (December, 1972) Including Recommendations of the Department of the Treasury* (Comm. Print 1973). As this Report shows, the President's Commission recom-

C. *The Purposes, Powers and Operation of Massachusetts Credit Unions as Reflected in This Record Demonstrate the Absence of Similarity Between Credit Unions and the Associations.*

Both the associations and the Solicitor General[45] avoid any reference to the legislative history of § 1464(h) or to other relevant taxing statutes that bear on the proper construction of § 1464(h). They would have the Court view the issue of "similarity" in a vacuum, divorced from its historical underpinnings and proper context. This is a path the Court has firmly rejected. *See, e.g., Muniz* v. *Hoffman, supra,* 422 U.S. at 467; *Moody* v. *Albemarle Paper Co., supra,* 417 U.S. at 626. However, even if viewed on its own terms, the associations' argument lacks substance.

1. Statutory Purposes and Powers.

Appellants contend that the powers and purposes of Massachusetts credit unions coincide with those of federal

mended equal tax treatment of credit unions and other deposit intermediaries, including savings and loan associations, *id.* at 57-58, 71; the Treasury Department, working from the President's Commission's recommendations, supported continuing tax exemptions for credit unions. *Id.* at 185; *see id.* at 186. Congress, however, has retained the income tax exemption for state-chartered credit unions, and the broader tax exemption for federally-chartered unions. Congressional inaction does not justify judicial revision. The policy-making branches should continue the debate in their own spheres.

[45] In judging that the exemption of Massachusetts credit unions from § 11 violates § 1464(h) (U.S. Br. at 14-16), the United States has contented itself with summarizing the associations' brief. Its discussion of the credit union claim does not rely on, or cite, a single decision of this or any other court.

savings and loan associations. A brief review of the two types of institutions contradicts their argument.

Massachusetts credit unions are cooperative organizations, chartered by the state, M.G.L. c. 171, § 2, and created to serve the personal credit needs of people with limited incomes.[46] They operate "for the purpose of accumulating and investing the savings of [their] members and making loans to them for provident purposes." *Id.* While they may make mortgage loans, by specific statutory command the major focus of their lending activities is on personal loans. *See* M.G.L. c. 171, § 24(a)-(g) (West Supp. 1977).[47]

Credit union members are united by a common bond of occupation, association or residence. *See* M.G.L. c. 171, § 7 (West 1971).[48] Every member must hold at least one share in the credit union, and every member, regardless of

[46] *See* J.L. Snider, *Credit Unions in Massachusetts* at 3-5, 6, 20-21 (1939).

[47] These provisions list the seven types of loans credit unions may make; personal loans (§ 24[a]) and "[l]oans secured by first mortgages of real estate" (§ 24[b]) are two of the seven. The section then provides:

> Personal loans shall always be given the preference and, in the event there are not sufficient funds available to satisfy all loan applications approved by the credit committee, preference shall be given to the smaller loan.

[48] Appellants claim there are no statutory limitations on credit union membership. They overlook M.G.L. c. 171, § 7(c), which requires that every credit union's bylaws define "[t]he condition of residence, occupation or association which qualify [*sic*] persons for membership." The bylaws must be approved by the state Commissioner of Banks before the credit union may operate, and the Commissioner must specifically approve any amendment to bylaws governing membership qualifications. M.G.L. c. 171, §§ 9, 8 (West Supp. 1977). The Massachusetts statutory provisions on credit union membership are virtually the same as many other states' credit union statutes. *See, e.g.,* Conn. Stat. Ann. Tit. 36-196 (West Supp. 1978); N.H. Rev. Stat. Ann. § 394:5 (1968 Replacement Ed.); R.I. Gen. Laws § 19-21-5(M) (Bobbs-Merrill 1976).

how many shares, has one vote. This principle of democracy in voting is combined with a high degree of membership control over the operations of a credit union: members set the ceiling on loans and, through their elected directors, establish interest rates on loans and deposits and declare dividends. *See* M.G.L. c. 171, §§ 13, 15, 16, 18, 21, 25 (West 1971 and Supp. 1977).

Federal savings and loan associations are structured to operate differently. From the beginning, their mandate has been to serve as organizations designed "to provide for the financing of homes." 12 U.S.C. § 1464(a). The detailed statutory provisions governing the types and amounts of loans which associations may make, 12 U.S.C. § 1464(c) (Supp. V 1975, *as amended by* Act of August 3, 1976, Pub. L. 94-375, § 22, 90 Stat. 1078), show that this statutory purpose remains in full force today: virtually all permissible loans are related to real estate, and the associations' powers to lend money for personal loans, or non-real estate loans of any kind, is extremely limited. *See* 12 U.S.C. § 1464(c)(A), (B).[49]

The core of appellants' complaint about credit unions is their ability to make loans secured by first mortgages on real property. Credit unions have had this power for many years. *See* Mass. Stat. 1926, c. 273, § 24; J.L. Snider, *Credit Unions in Massachusetts* at 13-16 (1939). While the

[49] In terms of organization as well, the federal savings and loan associations are markedly distinct from state credit unions. The associations' operations are regulated in all important particulars by the Federal Home Loan Bank Board. *See* 12 U.S.C. §§ 1464(a), (b), (d), (e), (f), (i) (1970 and Supp. V 1975); 12 C.F.R. §§ 500.3, 541.1-556.9 (1977). In addition, a federal savings and loan association, when designated as a depository fiscal agent of the United States, 12 U.S.C. § 1464(k) (1970), is subject to direct regulation by the Secretary of the Treasury. *See* 12 C.F.R. § 545 (1977). The central role played by the members in the affairs of credit unions thus finds no parallel among the associations.

restrictions on credit unions' abilities to make mortgage loans have been relaxed over time,[50] the terms and conditions governing such loans overall remain very different from those applicable to federal savings and loan associations.[51] *Compare* G.L. c. 171, § 24(B), *with* 12 U.S.C. § 1464(c). The state court recognized this fact. *See* J.S. 43-44 and n. 9, Mass. Adv. Sh. (1977) at 913-914 and n. 9, 363 N.E. 2d at 484 and n. 9.

The relationship between state-chartered credit unions and federal savings and loan associations is not an issue of first impression. Three state courts in addition to the Supreme Judicial Court and one federal court have examined the question and all have found that credit unions fall outside § 1464(h). *First Fed. Sav. & Loan Ass'n* v. *Connelly*, 142 Conn. 483, 492, 115 A. 2d 455, 459 (1955),

[50] In citing maximum permissible amounts a credit union may accept on deposit or may lend on the security of a first mortgage, appellants refer in their brief only to those figures applicable to the largest credit unions, primarily those with assets over $4 million (App. Br. at 36-38). This selective method of citation is misleading, because the record does not indicate how many state-chartered credit unions in Massachusetts fall into the larger categories. In fact, only a small percentage of the 370 credit unions have assets over $4 million. *See* Annual Report of the Massachusetts Commissioner of Banks for 1973, Section B, at 45-79. The maximum deposits and loans which smaller credit unions are permitted to accept and make are more limited. *See* M.G.L. c. 171, §§ 10, 24(A), 24(B) (West Supp. 1977, *as amended by* Mass. Stat. 1977, c. 15, 19, 20-24).

[51] A situation may arise where an individual credit union neglects its statutory duty to favor personal over real estate loans. If so, the proper remedy is in state court to correct this situation. Individual credit unions' failures to perform their statutory obligations should not become the basis for striking down a duly enacted taxing statute on its face.

Furthermore, credit unions may only loan to members. The inherent limitations on every credit union's membership, resulting from the common bond requirement, in effect precludes them from directly competing with the associations for the home mortgage market.

appeal dismissed for want of a substantial federal question, 350 U.S. 927 (1956); *State* v. *Minnesota Fed. Sav. & Loan Ass'n*, 218 Minn. 229, 239-241, 15 N.W. 2d 568, 573-574 (1944); *Manchester Fed. Sav. & Loan Ass'n* v. *State Tax Comm'n*, 105 N.H. 17, 19-21, 191 A. 2d 529, 531-532 (1963); *see also United States* v. *State Tax Comm'n*, 348 F. Supp. 397, 400 (D. Mass. 1972), *aff'd and modified*, 481 F. 2d 963 (1st Cir. 1973); *cf. La Caisse Populaire Ste. Marie* v. *United States*, 563 F. 2d 505, 507-509 (1st Cir. 1977). These decisions reflect reasoned judgments about the basic nature of credit unions, and should be followed here.[52]

2. Actual Operation of Credit Unions.

The Supreme Judicial Court concluded that the test of "similarity" for purposes of § 1464(h) was what credit unions and federal savings and loan associations do "in fact," rather than what they might do. J.S. 43, Mass. Adv. Sh. (1977) at 913, 363 N.E. 2d at 484. Under this standard the associations claim to have demonstrated actual competition between themselves and the Massachusetts credit

[52] There is a final consideration. Decisions of this Court concerning 12 U.S.C. § 548, the national bank tax provision, recognize that the states have wide latitude in deciding how to treat a class of its own state-chartered financial institutions for tax purposes. *See, e.g., Michigan Nat'l Bank* v. *Michigan*, 365 U.S. 467, 482 (1961); *Bank of Redemption* v. *City of Boston*, 125 U.S. 60, 67-68 (1888); *Mercantile Bank* v. *New York*, 121 U.S. 138, 160-161 (1887). All conclude that the states could reasonably exempt savings banks from taxes they imposed on the national banks. The same principle applies to Massachusetts' exemption of credit unions from the tax under attack. Its determination is a reasonable exercise of legislative judgment which should not be interfered with by this Court, particularly since it is one which is shared by Congress and most other states. See pp. 24-25, nn. 36, 37, *supra*.

unions (App. Br. at 39-41). The assertion is without support.

In making their claim of competition, appellants rely heavily on statistics and data drawn from the Annual Report of the Massachusetts Commissioner of Banks for 1973, Section B ("Annual Report"), filed with the Legislature (App. Br. 40-41). Most of this information was never introduced as part of the record before the Supreme Judicial Court,[53] and therefore cannot be considered by this Court in this case.[54] *New Haven Inclusion Cases*, 399 U.S. 392, 450 n. 66 (1970); *Ciucci* v. *Illinois*, 356 U.S. 571, 573 (1958); *Hedgebeth* v. *North Carolina*, 334 U.S. 806 (1948); Sup. Ct. R. 36.

On the record that was before the state court, the associations failed to support their claim of discrimination, for they did not make any showing of the extent, if any, to which the two classes of institutions were in direct or actual competition with each other.[55] As the state court ruled,

[53] The associations submitted certain statistics from the Annual Report to the Supreme Judicial Court after oral argument; the appellees filed a timely objection (A. 145). That court did not rule on the inclusion of this evidence in the record, but its rules prohibit the inclusion absent affirmative permission. Mass. R. App. P. 18, 365 Mass. 844, 864 (1974). Since that permission was not forthcoming, the material should not be considered as part of the record before this Court.

In addition, the associations' brief contains references to other portions of the Annual Report that were not submitted at any time to the Supreme Judicial Court.

[54] Should the Court decide to review the information submitted by the associations, however, it is appropriate that the Court have before it the entire Annual Report. To that end, defendants have filed a separate Motion To Accept Material to Supplement Record, which pertains to this Report.

[55] The only evidence in the record is a comparison of the percentages of assets which credit unions and federal savings and loan associations hold in various categories (A. 135-144). As the Supreme Judicial Court

such a showing was essential. J.S. 44, Mass. Adv. Sh. (1977) at 914, 363 N.E. 2d at 484. *See Michigan Nat'l Bank* v. *Michigan, supra,* 365 U.S. at 477, 482; *First Nat'l Bank* v. *Louisiana Tax Comm'n,* 289 U.S. 60, 64-65 (1933).

The associations fare no better if the selected statistical evidence on which they now depend is considered. They rely in large part on the real estate lending practices of 20 of the 370 credit unions (App. Br. 40). It is settled that proof of discrimination must show the evil to exist on a class basis; it is not enough merely to show that, in a limited number of individual instances, competition might be present. *Tradesmens Nat'l Bank* v. *Oklahoma Tax Comm'n,* 309 U.S. 560, 568 (1940); *see also Michigan Nat'l Bank* v. *Michigan, supra,* 365 U.S. at 476. A factual comparison by class negates appellants' selective marshalling of data and defeats their claim.[56]

In sum, appellants have not shown as a matter either of law or of fact that credit unions are "similar" institutions within the meaning of § 1464(h). They cannot escape the Massachusetts franchise tax on this ground.

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pointed out, examination of these figures simply serves to highlight the difference in real estate activities of credit unions on the one hand and savings and loan associations, cooperative banks, and savings banks on the other. J.S. 44, Mass. Adv. Sh. (1977) at 913-914, 363 N.E. 2d at 484.

[56] In 1973, the year on which the associations have focused, there were 370 credit unions in Massachusetts. Annual Report at 84. Their average assets were 3.45 per cent of those held by federal savings and loan associations. *Compare id.* at 84 *with* A. 132. Of the 370 credit unions, 220, or 60 per cent, placed *no* real estate loans during 1973. Annual Report at 46-79. The credit unions' aggregate investments in real estate loans were approximately 15 per cent of the savings and loan associations' aggregate investments. *Compare* Annual Report at 84 *with* A. 132, 143.

III. The Type of Tax Chosen by the Massachusetts Legislature — A Franchise Tax Measured by Income — is Authorized by 12 U.S.C. § 1464(h).

The Supreme Judicial Court found that the tax imposed by § 11 is a franchise tax measured by income, a levy on the privilege of doing business in the Commonwealth. J.S. 36, Mass. Adv. Sh. (1977) at 904-905, 363 N.E. 2d at 480. The terms of § 1464(h) explicitly authorize states to impose a "tax on such associations or their *franchise* . . ." (emphasis added). Although the meaning intended by Congress in using the word "franchise" may be subject to independent inquiry by this Court,[57] appellants have offered nothing in legislative history or any other source to contradict the judgment of the court below that the § 11 tax falls into a category permitted by the explicit terms of § 1464(h).[58] Therefore, the state court's determination that the tax is authorized by Congress should stand.[59]

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[57] *Compare Macallen Co.* v. *Massachusetts,* 279 U.S. 620, 626 (1929) (independent inquiry required), *with, e.g., Norton Co.* v. *Department of Revenue,* 340 U.S. 534, 538 (1951) (state construction conclusive as long as constitutional). *Cf. Gurley* v. *Rhoden,* 421 U.S. 200, 208 (1975).

[58] Appellants contend that the tax cannot be considered a "franchise" tax imposed on the privilege of doing business in Massachusetts, because it contains no apportionment provision (App. Br. 50-52). This is not so. The Court has recognized that state corporate franchise taxes may be measured by a variety of objects, including property exempt from direct taxation. *See Educational Films Corp.* v. *Ward,* 282 U.S. 379, 389-391 (1931); *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n,* 266 U.S. 271, 280-285 (1924). The real issue is not whether the tax may properly be called a "franchise" tax, but whether the absence of an apportionment provision violates the Commerce Clause or Due Process and Equal Protection Clauses of the Fourteenth Amendment. These questions are discussed below. See pp. 40-47, *infra.*

[59] The court below accepted the appellants' general proposition that the state tax should fit within one of the categories listed in § 1464(h) to

The associations' other objections offered on appeal fail to raise any points which were not answered satisfactorily by the state court. They contend that the measure of the tax in § 11 is defective because it imposes only an income-related tax on appellants, while state institutions pay both an income- and deposits-related tax[60] (App. Br. 48, 60-61). As the Supreme Judicial Court correctly observed, "[t]his is not a circumstance of which the associations properly may complain," because the statute obviously does not forbid "discrimination . . . in favor of Federal savings and loan associations." J.S. 37-38, n. 8, Mass. Adv. Sh. (1977) at 906, n. 8, 363 N.E. 2d at 481, n. 8.[61]

Appellants also argue that if the § 11 tax is considered as a tax on "income" within the meaning of § 1464(h), it is not sanctioned by that section because the income taxed is not truly "net income." Their complaint is that Massachusetts does not recognize distributions to association members as a

be valid. However, the concern of the statute is nondiscrimination. The type of tax a state chooses bears no relation to that issue. Congress may therefore have intended its list as illustrative rather than exhaustive, to make the point that whatever the method of taxation, equality in treatment should be observed. Such a reading would be in harmony with Congress' current treatment of national banks. *See* 12 U.S.C. § 548, quoted at p. 13, n. 13, *supra*. Under such a reading, appellants' argument about the proper definition of the state tax would be academic.

[60] The difference in measures is the result of *United States* v. *State Tax Comm'n*, 481 F. 2d 963 (1st Cir. 1973), which enjoined application of the deposits-based tax to federal associations. See p. 5, *supra*.

[61] Additionally, appellants lack standing to make this argument. *Data Processing Service* v. *Camp*, 397 U.S. 150, 152 (1970) (the first question in standing is whether the challenged action has caused plaintiff injury in fact, economic or otherwise); *Sierra Club* v. *Morton*, 405 U.S. 727, 734-735 (1972) (party seeking review of government policy must himself be among those injured by it).

deduction from gross income[62] (App. Br. 52-58). The argument founders on a false premise. Appellants imply that either Congress or this Court has enacted a single, fixed definition of "net income" which the states are obliged to follow. This is not the case. The Court has recognized that "net income" is not a worthy candidate for judicial definition. It treats the term's meaning as a policy issue; net income is gross income less those exclusions or deductions authorized by the taxing authority. *Doyle* v. *Mitchell Brothers Co.*, 247 U.S. 179, 183-187 (1918). *Cf. United States* v. *Kirby Lumber Co.*, 284 U.S. 1, 3 (1931).[63] The adoption of a particular definition would introduce a rigidity especially inappropriate in the tax area, where state policy judgments are given wide latitude. *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 509-510 (1937).[64]

[62] In the state court appellants treated their grievance about distributions primarily as a state law issue, arguing that such distributions should be included in the term "operating expenses" in § 11. The court disagreed. J.S. 35, Mass. Adv. Sh. (1977) at 903-904, 363 N.E. 2d at 480. This judgment on state law has not been appealed, and in any event should be deemed conclusive. *See Colonial Pipeline Co.* v. *Traigle*, 421 U.S. 100, 109 (1975).

[63] Expert tax commentators share the Court's recognition of the futility in trying to "capture the concept of income and confine it within a phrase." S. Surrey and W. Warren, *The Income Tax Project of the American Law Institute: Gross Income, Deductions Accounting, Gains and Losses, Cancellation of Indebtedness*, 66 Harv. L. Rev. 761, 771 (1953).

[64] Appellants endeavor to gain support for their preferred definition of net income from accounting texts, an inadequate surrogate for legislative history, especially in light of federalism principles supporting state judgments on tax policy. *See Butler Brothers* v. *McColgan*, 315 U.S. 501, 507 (1942); *cf. Ivan Allen Co.* v. *United States*, 422 U.S. 617, 635 (1975).

IV. The Associations' Commerce Clause Argument Lacks Supporting Evidence and is Contradicted by the Fundamental Principle that a Domiciliary Corporation Must Share the Costs of State Government.

The associations are all institutions domiciled in Massachusetts. They have their home offices in Massachusetts, and the record shows no branch office in any other state. Further, the appellants have introduced no evidence whatever that any of their income derives from activities outside Massachusetts.

Such circumstances do not merit the attention of the Commerce Clause. The fact of domicile,[65] coupled with an absence of proof that out-of-state property or activities are being taxed, disposes of the issue. This Court has without exception held:

> The obligation of one domiciled within a state to pay taxes there, arises from unilateral action of the state government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute its burdens equably among those who enjoy its benefits. Hence, domicile in itself establishes a basis for taxation. Enjoyment of the privileges of residence within the state, and the

[65] Unlike labels which emphasize "draftsmanship and phraseology," *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 281 (1977), domicile imports a reasoned analysis of both the nexus between the taxpayer and the state, and the benefits conferred on the taxpayer by the state. Only in exceptional circumstances, not presented by the record in this case, is domicile an insufficient foundation for taxation. *See Standard Oil Co.* v. *Peck*, 342 U.S. 382, 383-384 (1952) (state cannot levy *ad valorem* personal property tax on river barges lacking contact with the state); *but see Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 294-295 (1944).

> attendent right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government. *Lawrence* v. *State Tax Comm'n*, 286 U.S. 276, 279 (1932) (Stone, J.).

The *Lawrence* case concerned an individual who brought a due process challenge to his domiciliary state's taxation of income derived from activities elsewhere. The Court rejected the claim. Eleven years later, in *Memphis Natural Gas Co.* v. *Beeler*, 315 U.S. 649 (1942), the Court (again through Chief Justice Stone) applied parallel reasoning to reject a corporation's Commerce Clause attack on income tax imposed by its state of "commercial domicile":

> [E]ven if taxpayer's business were wholly interstate commerce, a nondiscriminatory tax by Tennessee upon the net income of a foreign corporation having a commercial domicile there . . . is not prohibited by the commerce clause on which alone taxpayer relies. 315 U.S. at 656.[66]

[66] More recently, the Court has indicated that the cases which raise substantial problems under the Commerce Clause involve nondomiciliary taxpayers. In *General Motors Corp.* v. *Washington*, 377 U.S. 436, 441 (1964), the Court stated:

> [T]he question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded. *Where . . . the taxing State is not the domiciliary State*, we look to the taxpayer's business activities within the State . . . to determine . . . ". . . whether the state has given anything for which it can ask return" (quoting *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444 [1940]) (emphasis added).

As with other domiciliaries, every federal savings and loan association which is a party to this appeal bears a responsibility to "pay its way." *Postal Telegraph-Cable Co.* v. *Richmond*, 249 U.S. 252, 259 (1919). As long as the center of activity is Massachusetts, income from business with interstate elements may be taxed along with income from purely intrastate business. *General Motors Corp.* v. *Washington*, 377 U.S. 436, 439 (1964); *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458-465 (1959); *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 294-298 (1944); *Matson Navigation Co.* v. *State Bd. of Equalization of Calif.*, 297 U.S. 441, 443-444 (1936); *Wisconsin* v. *Minnesota Mining Co.*, 311 U.S. 452, 453 (1940); *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113, 120 (1920); *United States Glue Co.* v. *Oak Creek*, 247 U.S. 321, 327 (1918).

Thus, even if the associations carried on interstate commerce, the tax imposed by § 11 would not be undermined.[87] Moreover, in this case the record contains no evidence that interstate commerce is involved in the activities which are taxed. The measure of the tax is each association's net operating income. The primary source of that income is from interest paid by those who have borrowed money to purchase real estate and build homes. *See* 12 U.S.C. § 1464(c). Appellants present no evidence as to how many, if any, of these borrowers live outside Massachusetts. They offer no proof that any of the loan transactions took place

[87] It is axiomatic that the act of doing business in interstate commerce does not relieve a corporation from its just share of the state tax burden even though it increases the cost of doing business. *Colonial Pipeline Co.* v. *Traigle*, 421 U.S. 100, 108 (1975); *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 254 (1938). *See Complete Auto Transit, Inc.* v. *Brady*, *supra*, 430 U.S. at 288 (Court has rejected proposition that interstate commerce is immune from taxation).

outside Massachusetts. Since the offices of the associations are within the state, it is unlikely that loan transactions are centered anywhere but Massachusetts. Appellants do present evidence that a portion of their loans are secured by out-of-state real estate (A. 134). But the tax is imposed on income, not real estate, and the situs of the property is immaterial to Commerce Clause analysis.[88] The associations have therefore failed to shoulder, much less carry, their burden of proof.

This Court has left no doubt that it is the taxpayer who must establish his case on the record:

> The general rule, applicable here, is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption. *Norton Co.* v. *Department of Revenue*, 340 U.S. 534, 537 (1951).

Accord, General Motors Corp. v. *Washington*, *supra*, 377 U.S. at 441; *cf. Shaffer* v. *Carter*, 252 U.S. 37, 55 (1920).[89]

Similar practical principles dispose of appellants' assertions about multiple tax burdens. One danger in permitting any state taxes on foreign corporations is that multiple taxes imposed by a number of states might, in cumulation, intrude

[88] Appellees recognize that Massachusetts has no power to impose a tax on tangible property permanently located in another state. *See Northwest Airlines, Inc.* v. *Minnesota*, *supra*.

[89] In *Norton Co.* v. *Department of Revenue*, *supra*, the Court pointed out that the appellants' burden is not met by "showing a fair difference of opinion which as an original matter might be decided differently. . . . [W]e have power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, but that does not mean that we will re-examine, as a court of first instance, findings of fact supported by substantial evidence." 340 U.S. at 537-538.

impermissibly on interstate commerce. *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 256, 258 (1938); *see General Motors Corp.* v. *Washington, supra*, 377 U.S. at 440. It is fear of multiple taxation which leads the Court on occasion to insist that the state adopt a formula to apportion income in such a way that only income related to the taxpayer's business contacts in the state will be subject to tax. *Id.* at 440-441. However, the Court does not express such fears or impose apportionment when the tax emanates from the state of domicile and the subject of the tax has not establsihed a "tax situs" elsewhere. *Central Railroad Co.* v. *Pennsylvania*, 370 U.S. 607, 612 (1962); *cf. Standard Oil Co.* v. *Peck*, 342 U.S. 382, 384 (1952). Indeed, a decision precluding state taxation of a domiciliary corporation, solely on speculation that another state might attempt to tax the same items, would serve to exempt a corporation from any tax on its interstate operations.[70] Such notions of immunity have long since been rejected. *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 288 (1977). Accordingly, this Court — emphasizing that it "cannot deal in abstractions" — has held that when "[t]here is nothing to show that multiple taxation is present[,]" a taxpayer's claim fails of proof. *Northwestern States Portland Cement Co.* v. *Minnesota, supra*, 358 U.S. at 463. The associations have not shown that they are victims of multiple taxation, or that they are likely to be.[71] Their

[70] Here, as in *Hawley* v. *City of Malden*, 232 U.S. 1, 13 (1914):

> The real ground of complaint . . . is not that . . . [income is] taxed in one place rather than in another but that . . . [it is] taxed at all . . ..

[71] The associations' reliance on *Brady* v. *John Hancock Mut. Life Ins. Co.*, ___ Miss. ___, 342 So. 2d 295 (1977), *appeal dismissed for want of a substantial federal question*, ___ U.S. ___, 98 S. Ct. 32 (1977), is misplaced. The tax in *Brady* was upheld on the basis of specific evidence in the record that the taxpayer, an insurance company, had offices and agents in Mississippi, qualified to do business in Mississippi, carried on insurance and mortgage-lending business which were interrelated, and made loans to local residents. 342 So. 2d at 296, 297, 304. Thus in *Brady* there was sufficient evidence of contacts between the state and the taxpayer to justify the tax. *See National Geographic Society* v. *California Bd. of Equalization*, 430 U.S. 551, 560 (1977); *see also General Motors Corp.* v. *Washington, supra*, 377 U.S. at 442-446.

In this case, by contrast, there is nothing to contradict the finding below that

> [t]he record is devoid of any information with respect to the contacts and activities of any individual Federal savings and loan association in any other jurisdiction. J.S. 39, Mass. Adv. Sh. (1977) at 908, 363 N.E. 2d at 482.

On this record the associations fall within the protective ambit of *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753, 754-758 (1967), and *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 341-342 (1954), and could not be taxed by a neighboring state. Thus the jeopardy of multiple taxation asserted by the appellants is tenuous in law as well as unfounded in fact. *See National Geographic, supra*, 430 U.S. at 556 (Court does not adopt "slightest presence" standard of constitutional nexus); *see also General Motors Corp., supra*, 377 U.S. at 449 (taxpayer has not demonstrated "what definite burden in a constitutional sense" it suffers from multiple taxation).

claim that § 11 violates the Commerce Clause is without merit and should be rejected.

V. The Associations' Due Process and Equal Protection Claims are Insubstantial.

Appellants' arguments under the Due Process and Equal Protection Clauses of the Fourteenth Amendment restate prior claims, in different dress. They contend that apportionment of income according to state of origin is compelled

by due process, but they offer no evidence that income can be fairly allocated to any state other than Massachusetts. Moreover, their claim fails on an independent ground. The associations are domiciled in Massachusetts, and, as indicated above, § 11 comes well within the taxing powers of a domiciliary state. This Court has stated:

> If . . . property has had insufficient contact with States other than the owner's domicile to render any one of these jurisdictions a "tax situs," it is surely appropriate to presume that the domicile is the only State affording the "opportunities, benefits, or protection" which due process demands as a prerequisite for taxation. . . . *Central Railroad Co.* v. *Pennsylvania*, 370 U.S. 607, 612 (1962) (citation omitted).

See Northwest Airlines, Inc. v. *Minnesota*, 322 U.S. 292, 294 (1944).

A taxpayer has a heavy burden of proof in trying to overcome the strong presumption favoring the taxing power of the domiciliary state. It must, at a minimum, show that the subject of the tax, here the interest from mortgage loans, may be similarly taxed in another jurisdiction. *Central Railroad Co.* v. *Pennsylvania, supra.* This appellants have failed to do.

Finally, the associations assert, without great vigor, that the deduction for required additions to guaranty funds denies them equal protection of the laws. It is doubtful that the record establishes any inequality, in practical effect, sufficient to invoke a constitutional inquiry into the statute's rationality. *See Lawrence* v. *State Tax Comm'n*, 286 U.S. 276, 283-284 (1932). In any event, the discretion of the states in setting tax policy is very broad. *Lehnhausen* v.

Lake Shore Auto Parts Co., 410 U.S. 356, 359-365 (1973). The Massachusetts Legislature is to be afforded "the widest possible latitude within the limits of the Constitution," *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 510 (1937), for "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940). The challenged deduction reflects rational policymaking, not "a hostile and oppressive discrimination against particular persons and classes." *Id.* Appellants' equal protection claim is therefore insubstantial.

Conclusion.

For the reasons presented above the Court should affirm the judgment of the Supreme Judicial Court.

Respectfully submitted,

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Statutory Appendix.

Title 12, United States Code, § 1464(h) (1970).

(h) Exemptions from taxation.

No State, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.

Revised Statutes, § 5219, 44 Stat. 223 (1926).

The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

(a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided*, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in

competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: *Provided, however,* That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by non-residents of any State, shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such non-resident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any

subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as heretofore in force shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof to the extent that such tax would be valid under said section.

(Approved, March 25, 1926.)

MASS. GEN. LAWS ANN. c. 63, § 11 (WEST 1977).

Every savings bank as defined in chapter one hundred and sixty-eight, every cooperative bank as defined in chapter one hundred and seventy and every state or federal savings and loan association located in the commonwealth shall pay to the commissioner an annual excise equal to the following:

(*a*) on or before the twenty-fifth day of the seventh month of the taxable year, there shall be paid (1) six hundred twenty-seven one thousandths per cent of a reasonable estimate of its net operating income, as hereinafter defined, for the taxable year, and (2) one-sixteenth of one per cent of the average amount of its deposits or of its savings accounts and share capital for the first six months of the taxable year, after deducting from such average amounts (i) its real estate used for banking purposes, valued at cost less reasonable depreciation, and (ii) the unpaid balances on its loans secured by the mortgage of real estate taxable in this commonwealth, or real estate situated in a state contiguous to the commonwealth, and within a radius of fifty miles of the main office of such bank or association, and in the case of a bank or association not previously subject to tax by the commonwealth the unpaid balances on such of its loans

secured by the mortgage of real estate located outside of the commonwealth which are outstanding on March first, nineteen hundred and sixty-six, both as of the close of such six-month period; and

(*b*) on or before the twenty-fifth day of the first month following the close of the taxable year, there shall be paid (1) one and two hundred fifty-four one thousandths per cent of its net operating income, as hereinafter defined, for the taxable year, less the estimated amount previously paid with respect to such income, and (2) one-sixteenth of one per cent of the average amounts of its deposits or of its savings accounts and share capital for the second six months of the taxable year, after deducting from such average amount (i) its real estate used for banking purposes, valued at cost less reasonable depreciation, and (ii) the unpaid balances on its loans secured by the mortgage of real estate taxable in this commonwealth, or real estate situated in a state contiguous to the commonwealth, and within a radius of fifty miles of the main office of such bank or association, and in the case of a bank or association not previously subject to tax by this commonwealth the unpaid balances on such of its loans secured by the mortgage of real estate located outside of this commonwealth which are outstanding on March first, nineteen hundred and sixty-six, both as of the close of the taxable year.

For the purpose of this section, "net operating income" shall mean gross income from all sources, without exclusion, for the taxable year, less (i) operating expenses, (ii) net losses upon assets sold, exchanged or charged off as uncollectible during the taxable year, and (iii) minimum additions during the taxable years to its guaranty fund or surplus required by law or the appropriate federal and state supervisory authorities; and "taxable year" shall mean any fiscal or calendar year or period for which the bank is required to make a

return to the federal government. Federal and state taxes paid or accrued during the taxable year shall not be deductible in computing "net operating income".